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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 630.

CENTRAL TRANSPORTATION COMPANY,
Appellant,

vs.

Z. D. ATKINS, Commissioner, Etc.,
Appellee.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

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INDEX.

	Page
Opinion of the court	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
Federal questions in the courts below	5
Reasons for granting the writ of certiorari	10
Argument	12
Points Numbers 1 and 2:	
Engagement in commerce or in activities so closely related thereto as to be a part of such commerce	12
Gross receipts derived from participation in commerce during transit in, to and through the several states	14
Point Number 3:	
State exemption of interstate transportation	16
Defense raised by respondent	19
Conclusion	20
Appendix A—Opinion	21
Appendix B—Order and decree of the court	32
Appendix C—Opinion on petition to rehear	33
Appendix D—Retailers' Sales Tax Act	36

Cases Cited.

Adams Manufacturing Co. v. Storen, 304 U. S. 307	14
Broadacre Dairies v. Evans, 193 Tenn. 441	7, 11, 19

Canton R. Co. v. Rogan, 340 U. S. 511 11
Central Greyhound Lines of New York v. State Commissioner, 334 U. S. 653 .....11, 15
Crescent Amusement Co. v. Carson, 187 Tenn. 112 7
Cudahy Packing Co. v. State of Minnesota, 246 U. S. 455 10
Cudahy Packing Co. v. State of Minnesota, 38 S. Ct. 375 13

Fargo v. Michigan, 121 U. S. 230 .....10, 13, 15
Freeman v. Hewitt, 329 U. S. 249, 274 .....11, 15

Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 225 .....11, 13, 15
Gwin, White & Prince v. Henneford, 305 U. S. 455 ...10, 13

Helson & Randolph v. Kentucky, 279 U. S. 245 10-11

International Harvester Company v. Indiana Department of Treasury, 322 U. S. 340 .....10, 15

Joseph v. Carter & Weekes Stevedoring Company, 330 U. S. 422 .....10, 14

Kansas City F. T. S. & M. Ry. v. Totkin, 240 U. S. 227 15

Madison Suburban Utility [illegible] v. Carson, 191 Tenn. 300 .....9, 17
McGoldrick v. Berwin-White Coal Company, 309 U. S. 33 .....10, 15
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 11

New Jersey Bell Telephone Co. v. State Board of New Jersey, 280 U. S. 338 .....10, 11, 14

Philadelphia & S. M. Steamship Co. v. Commonwealth of Pennsylvania, 122 U. S. 326 15
Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U. S. 90 .....10, 14

Saverio v. Carson, 186 Tenn. 166 7
Smoky Mountain Canteen Co. v. Kizer, 193 Tenn. 598 17
Spector Motor Service v. O'Connor, 340 U. S. 602 11

Statutes Cited.

Tennessee Code Annotated:
Section 67-3001 ..... 3, 4
Section 67-3002 (b) 3
Section 67-3002 (j) 3, 16
Section 67-3005 ..... 3, 16
Section 67-3007 ..... 3, 7, 9, 16, 18
Section 67-3016 3
Section 67-3017 3
Section 67-3018 ..... 3, 16
Section 67-3019 ..... 3, 9
Section 67-2020 (a) 3, 9, 17
Section 67-3020 (b) 3, 9, 17
Section 67-3020 (d) 3, 9, 17
Section 67-3045 ..... 3, 7
Title 7, Chapter 26a, U. S. C. A. 4
28 U. S. C. A. 1257 (3) 2

Constitution Cited.

United States Constitution, Article I, Section 8 3

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the decree of the Supreme Court of the State of Tennessee entered on the 29th day of July, 1957, in the case there entitled Central Transportation Company v. Z. D. Atkins, as Commissioner of Finance and Taxation in Tennessee.

OPINION OF THE COURT.

An opinion was entered on July 29th, not yet published in the Tennessee Reports, but will be so published in Volume 200. Printed in full in Appendix A.

A Petition to rehear was seasonably filed on the 19th day of August, 1957, entertained by the Court and denied on the 4th day of October, 1957 (R. 199), in a written opinion. Printed in full in Appendix B.

JURISDICTION.

The decree of the Supreme Court of the State of Tennessee entered upon the 29th day of July, 1957, became final upon the denial of petitioner's petition to rehear on the 4th day of October, 1957, said decree sustained the Davidson County Chancery Court in dismissing petitioner's suit and taxes petitioner with the cost. Said decree being entered by the highest Court of the State of Tennessee in which a decision could be had. Printed in Appendix C.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. 1257 (3).

QUESTIONS PRESENTED.

1. Whether or not a local corporation,

(a) the owner of a number of tractor-trailer units;

(b) and a repair shop with facilities for maintenance of its vehicles; and which is

(c) engaged in the business of leasing, repairing, maintaining, inspecting and servicing its trucks for regular use in commerce by a single lessee; and

(d) providing all over-the-road necessities, such as gasoline, oil, parts, repairs, permits, tolls, food and lodging for drivers while trucks are

(e) operated in, to and through the several states,

(f) for which lessee pays a substantial sum per mile as rental for such use and consumption, is engaged in

such active participation and furtherance of interstate commerce as to be a part thereof.

2. Whether or not, in this case, petitioner's gross receipts earned from the lease of its tractor-trailer units used wholly in interstate transportation at a substantial rate per mile traveled is subject to a local privilege or gross receipts tax.

3. Whether or not the General Assembly of the State of Tennessee, in the passage of the Retailers' Sales Tax Act, intended to exempt from levy and collection sales and use tax upon the use and consumption of transportation facilities used regularly in, to and through the several states in commerce, in order not to impinge upon the Federal Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provision here involved is the commerce clause, Article I, Section 8 of the United States Constitution:

> "Article I, Sec. 8 (1). The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.
>
> "(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

The Statutory provisions involved herein are Sections 67-3001, 67-3002 (b), 67-3002 (j), 67-3005, 67-3007, 67-3016, 67-3017, 67-3018, 67-3019, 67-3020 (a) (b) (d), and 67-3045 of the Retailers' Sales Tax Act, Tennessee Code Annotated. Printed in Appendix D.

STATEMENT OF THE CASE.

The petitioner formerly engaged in the interstate transportation for hire, of unprocessed farm and orchard products, in the spring of 1940 leased by written instrument all of its trucks to the Central Produce Company then and now engaged in the interstate buying, transporting and selling of agricultural products at wholesale (R. 17).

Petitioner's lessee is duly licensed as an interstate dealer in agricultural products, under the Perishable or Agricultural Commodities Act, Title 7, Chapter 20a, U. S. C. A., and holds a permanent permit from respondent's office to transport its products into and out of Tennessee free of sales and use tax under Registration No. 191-06-0627 (R. 20).

During the period involved petitioner received from the lease of its tractor-trailer units $483,659.69[1] and for the use of its smaller trucks used locally in Tennessee $51,106.17 (R. 35, 39).

The Retailers' Sales Tax Act of Tennessee, Section 67-3001 et seq., was enacted by the General Assembly in the spring of 1947, and became effective July 1, 1957.

On the 19th day of December, 1955, the respondent, Commissioner of Finance and Taxation of the State of Tennessee, assessed petitioner $12,967.66, including penalty and interest for non-payment of sales tax, based on its receipts from the lease of its trucks to the Central Produce Company, said sum was duly paid under protest and suit was instituted by petitioner in the Davidson County Chancery Court for recovery of said sum on the 17th day of January, 1956.

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[1] During said period petitioner's seven tractor-trailer units were operated 1,968,485 miles, ninety-eight per cent of said mileage being in states other than Tennessee, at an operating cost in transit of $152,282.65, ninety-nine per cent of said sum being spent by petitioner in states other than Tennessee (R. 101, 139).

Upon a hearing, the Davidson County Chancery Court entered a decree dismissing petitioner's suit, from which an appeal was had to the Supreme Court of Tennessee.

The material allegations of fact averred in petitioner's complaint were admitted by respondent in his answer. The proof was not controverted.

FEDERAL QUESTIONS IN THE COURTS BELOW.

1. Throughout the proceedings below, the petitioner contended that it was engaged in interstate commerce or in activities so closely related thereto as to be a part of such commerce, and not subject to a local privilege tax.

(a) The complaint filed by petitioner in the Chancery Court set out:

> " . . . that it not only furnished instrumentalities to be used in interstate commerce, but is as a matter of law and fact engaged in interstate commerce, or in activities so closely related thereto as to be a part of such commerce" (R. 36).

(b) Specifically, petitioner assigned as error in the Supreme Court of Tennessee that:

> "The Learned Chancellor erred in failing to find, as a matter of law and fact, that the complainant was and is engaged in interstate commerce, or in activities so closely related to interstate commerce as to be a part of said commerce and under the protection of the commerce clause of the Federal Constitution, Art. 1, Sec. 8" (R. 158).

(c) Petitioner contended in the Supreme Court of Tennessee that petitioner's lessee:

> " . . . is regularly and continuously engaged in transporting goods into and through the several states in interstate commerce and uses the leased trucks for

that purpose, relying solely upon complainant for maintenance, repairs, gasoline, oil, and all over-the-road expenses during such interstate operation, all of which is a direct and necessary aid in the furtherance of commerce" (R. 176).

(d) Petitioner contended in the courts below that respondent admitted the material allegations of fact averred in petitioner's complaint, including the above facts.[2]

2. Throughout the proceedings below, the petitioner contended that the Retailers' Sales Tax Act was a privilege tax levied against its gross receipts derived from the use of its tractor-trailer units in states other than Tennessee in commerce.

(a) The complaint filed by petitioner in the Chancery Court set out that:

"... such assessment and collection as to the revenue received by complainant for the lease of its long-haul tractor-trailer units, used wholly in interstate transportation is in violation of the commerce clause of the Constitution of the United States, Art. 1, Sec. 8" (R. 8, 9).

(b) Petitioner specifically assigned as error in the Supreme Court of Tennessee that:

"The Learned Chancellor erred in failing to find, as a matter of law and fact, that complainant received

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[2] "It is admitted . . . under the terms of the lease complainant was required to furnish the equipment and service it, purchasing new equipment, tires, tubes, gas, oil, etc., as required, and that the lessee would pay to complainant as rental a stipulated amount per mile according to the mileage operated by the lessee on each truck, . . ." (R. 23).

"It is admitted that trucks Nos. 4, 7, 11, 12, 14, 16 and 17 leased by Central Produce Company from complainant are tractor-trailer units used for long hauls, and that these trucks are used to go after and transport produce from other states to Tennessee and to transport produce from Tennessee into other states" (R. 25).

$483,649.69 during the period involved from the lease of its long-haul trucks, used as instrumentalities in interstate commerce, and that said receipts were gross receipts earned in commerce, and not subject to a State privilege or gross receipts tax, such being repugnant to Art. 1, Sec. 8 of the Federal Constitution" (R. 158).

(c) The Supreme Court of Tennessee has consistently held the Retailers' Sales Tax Act to be a privilege tax.[3]

3. Throughout the proceedings below the petitioner contended that it was the intention of the Legislature of Tennessee in the passage of the Retailers' Sales Tax Act to exempt interstate transportation from levy and payment of sales and use tax.

(a) Petitioner contended in the Courts below that Section 67-3007, Tennessee Code Annotated, was intended to exempt interstate commerce from liability for sales and use tax (R. 9):

> "Sec. 67-3007. Interstate commerce exempt.—It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for the export; nor is it the intention of this chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state." Appendix D.

(b) It was contended in the Courts below that respondent, Commissioner, promulgated Rule No. 71 by authority of Section 67-3045 of the Act expressly stating that freight

[3] Broadacre Dairies v. Evans, 193 Tenn. 441; Crescent Amusement Co. v. Carson, 187 Tenn. 112; Saverio v. Carson, 186 Tenn. 166.

or other transportation charges derived from interstate commerce are not subject to sales or use tax.

> "Freight, delivery or other like transportation charges are subject to the Sales and Use Tax if title to the property being transported passes to the vendee at the destination point. Where title to the property being transported passes to the vendee at the point of origin, the freight or other transportation charges are not subject to the Sales or Use Tax. It is immaterial whether the vendor or vendee actually pays for any charges made for transportation, whether the charges were actually paid by one or the other, or whether a credit or allowance is made or given for such charges" (R. 11).

(c) It was contended in the Courts below that the Legislature intended to limit the word "sales" wherein it involved the use and consumption of personal property rather than title, to personal property used and consumed in Tennessee:

> "Sec. 67-3002 (j). 'Retailer' means and includes every person engaged in the business of making sales at retail, or for distribution, or use, or consumption or storage to be used and consumed **in this state.**"

> "Sec. 67-3005 . . . For the purpose of this act the use, or consumption or distribution, or storage to be used or consumed **in this state** of tangible personal property shall be equivalent of a sale at retail and the tax shall thereupon immediately levy. . . ."

> "Sec. 67-3018 . . . Every 'dealer' making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use or other consumption, **in this state** shall at the time of making sales, collect the tax imposed by this act from the purchaser." Appendix D.

(d) Petitioner assigned as error in the Supreme Court of Tennessee that:

> "The Learned Chancellor erred in concluding from the word 'sales', as defined in Sec. 67-3002 (b) of the Act, that complainant was liable for the tax, overlooking the distinction between a transfer by sale of tangible personal property in Tennessee and the transfer by lease or rental of tangible personal property to be used in states other than Tennessee as contained in the context of the Sales Tax Act" (R. 156).

(e) Petitioner also contended in the Courts below that Section 67-3007 of the Act specifically exempted petitioner's lessee, Central Produce Co., from payment of sales or use tax to lessor by reason of lessee's interstate operation; thus, petitioner was also relieved of payment thereof by Sections 67-3019, 67-3020 (a) (b) (d) of the Act. Appendix D.

(f) Petitioner assigned as error in the Supreme Court of Tennessee the following:

> "The Learned Chancellor erred in concluding that, 'the fact that complainant's lessee uses its trucks in commerce has no bearing upon the question,' although Sec. 67-3007 of the Act specifically exempts complainant's lessee from liability to complainant and/or the State of Tennessee for payment of the sales tax, thus the taxable incident would be extinguished by the exemption of lessee"[4] (R. 157).

(g) It was contended in the Courts below that, after the passage of the Sales and Use Tax Act, and prior to the effective date thereof, conferences were had in the offices of respondent, Commissioner, by representatives of lessor

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[4] Madison Suburban Utility Dist. v. Carson, 191 Tenn. 300, the Court held in substance the exemption of consumer relieved the seller of liability for tax.

and lessee at which it was determined by respondent's office that appellant, lessor, would not be liable for sales or use tax (R. 108).

As a result of said conferences, Quentin L. Housholder, Director Use Tax Division in respondent's office, by letter dated June 30, 1957, mailed permanent permits to Central Produce Co. for display in each of petitioner's tractor-trailer units providing for their use in commerce free of sales and use tax (R. 20).

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. The decision below was based wholly upon this Court's holding in the cases of International Harvester Company v. Indiana Department of Treasury, 322 U. S. 340,[5] and McGoldrick v. Berwin-White Coal Company, 309 U. S. 33,[6] as controlling. However, the taxable event there was wholly disjointed from interstate commerce; thus, said decisions were consistent only with cases wherein the local taxable event was **separate and distinct from commerce**;

The facts here are consistent with the facts in those cases involving local participation in commerce. **Joseph v. Carter & Weekes Stevedoring Company, 330 U. S. 422; Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U. S. 90; Fargo v. Michigan, 121 U. S. 230; New Jersey Bell Telephone Co. v. State Board of New Jersey, 280 U. S. 338**; and those cases involving aid and furtherance of commerce, **Gwin, White & Prince v. Henneford, 305 U. S. 455; Cudahy Packing Co. v. State of Minnesota, 246 U. S. 455; Helson & Randolph v. Kentucky, 279 U. S.**

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[5] The Harvester case involved an over-the-counter sale, completed in Indiana to a non-resident who came into Indiana to make the purchase.

[6] In the McGoldrick case the taxable event occurred in New York after the goods had come to rest in New York and had become a part of the mass of personal property in New York.

245; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 225. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, and those cases involving gross earnings derived from interstate commerce, **Canton R. Co. v. Rogan, 340 U. S. 511; Central Greyhound Lines of New York v. State Commissioner, 334 U. S. 653; Freeman v. Hewitt, 329 U. S. 249; New Jersey Bell Telephone Co. v. State Board of Taxes of New Jersey, 280 U. S. 338; and Spector Motor Service v. O'Conner, 340 U. S. 602.**

2. The Supreme Court in its opinion and decree overlooked petitioner's local participation in commerce, together with petitioner's interstate participation during transit of its vehicles in, to and through states other than Tennessee in commerce.

3. The questions presented here, arising out of the enforcement of the Tennessee Retailers' Tax Act are of a sort that has and will arise in the various states that have similar sales and use tax statutes,[7] particularly so as to that phase of the tax statutes wherein possession of tangible personal property is transferred rather than title, for use and consumption in states other than the taxing states. In this light, this case presents the necessity of this Court giving to the courts of the several states further criteria by which they can evaluate tax assertions that do or do not impinge upon the commerce clause of the Constitution.[8]

4. The opinion and decree of the Supreme Court of Tennessee is in conflict with previous decisions of this Court as well as established legal principles heretofore enunciated by this Court in former decisions.

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[7] The record discloses that fourteen states, into and through which petitioner's equipment operates, have sales and use tax statutes (R. 107).

[8] By virtue of the opinion below each state into or through which petitioner's tractor-trailer units operate could also levy a "use tax" based upon the lease value used in said state. Broadacres Dairies v. Evans, 193 Tenn. 441.

ARGUMENT.

POINTS NUMBERS 1 AND 2.

Engagement in Commerce or in Activities So Closely Related Thereto as to Be a Part of Such Commerce.

Petitioner is engaged in the business of supplying transportation equipment to its lessee, Central Produce Company, for use in its interstate business of buying, transporting and selling agricultural products at wholesale. During the period involved and prior thereto petitioner furnished lessee 7 trucks for local delivery use in Tennessee, including an occasional delivery into border states, and 7 long haul tractor-trailer units regularly used to transport its produce from, to and through the several states in commerce at a stipulated rate per mile traveled.[9]

The furnishing of said equipment included maintenance, parts, repairs, tires, accessories, inspections, etc., prior to transit in, to and through the several states, as well as all over-the-road necessities such as license, permits, tolls, repairs, gasoline, oil, food and lodging for drivers and funds advanced for ice in warm weather during transit in states other than Tennessee.[10] Lessee employed its drivers subject to approval of petitioner (R. 39, 101, 102).

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[9] Central Produce Company, lessee, transports large quantities of farm products, all of which is grown in states other than Tennessee; 60% of such products is delivered by rail, 26% by contract carrier and 14% is transported by lessee in petitioner's tractor-trailer units. Their principal use being to meet banana boats on docking from Cuba, Ecuador, Guatemala and Honduras (R. 46, 48).

[10] Expenses in transit, gasoline $116,953.30, oil $747.77, repairs $2,655.72, ice $8,637.63, food and lodging for drivers $22,524.71, tolls $120.00, overweight of load $538.62, loading $87.25, weighing vehicle $46.95 (R. 101, 102).

Petitioner contends that the sales tax collected by respondent on its gross receipts earned by its tractor-trailer units in commerce was in violation of the commerce clause of the Constitution.

Petitioner insists that this Court has repeatedly invalidated similar taxes wherein the levies affected interstate commerce. The first of such cases to gain judicial importance was the case of Fargo v. Michigan, 121 U. S. 230, wherein the controlling facts were quite similar to the facts here, in that the Merchants Dispatch Transportation Company possessed a number of freight cars which by agreement were used by the various railroads in transporting freight. The Merchants Dispatch for such use was paid a sum certain for each mile operated. The State of Michigan was prohibited by this Court from taxing such gross receipts derived from commerce.

The case of Fargo v. Michigan was cited in the case of Cudahy Packing Co. v. State of Minnesota, 38 S. Ct. 375, involving a tax levied against rail cars owned by Cudahy Packing Co. and leased to the railroad at one cent for each mile operated. The Court held that the tax was a property tax. The Court stated:

> ". . . but it is insisted that the tax imposed is not a property tax but one laid on the gross earnings, of course, if it is laid on the gross earnings as such, they being derived largely from interstate commerce it is an unconstitutional restraint or burden on such commerce and void." Fargo v. Michigan, 121 U. S. 230; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217.

The State of Washington sought to levy a privilege tax in the case of Gwin, White & Prince v. Henneford, 305 U. S. 455, upon its rather extensive local operations in Washington prior to their shipment of fruit in commerce. This Court, in reversing the State Court, stated:

"We need not stop to consider if any of the appellant's activities in carrying on its business are in themselves transportation, or foreign commerce for the entire service from which the compensation is paid is in aid of the shipment and sale of the merchandise in that commerce. Such services are under the protection of the commerce clause."

The Court in the case of New Jersey Bell Telephone Co. v. State Bd. of Taxes, 280 U. S. 338, distinguished between a franchise tax and a gross receipts tax, holding that a state may tax property locally used to carry out interstate commerce, but may not burden or interfere therewith by a gross earnings tax.

As was stated by the Court in the case of Adams Manufacturing Co. v. Storen, 304 U. S. 307:

". . . for half a century following the decision in Philadelphia S. & M. Steamship Co. v. Pennsylvania, 122 U. S. 326 . . . it has not been doubted that state taxation of local participation in interstate commerce measured by the entire volume of the commerce is likewise foreclosed."

The case of Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, and Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422, both involved the loading and unloading of boats used in interstate commerce. The Court concluded that such local activity was a part of interstate commerce and not subject to a local gross receipts tax.

Gross Receipts Derived From Participation in Commerce During Transit in, to and Through the Several States.

This Court has determined in a number of cases, including Puget Sound Stevedoring Co. v. Tax Commission, Joseph v. Carter & Weekes Stevedoring Co. and others,

that local participation in commerce was a part of commerce and immune to a state gross receipts tax derived therefrom.

In applying the above reasoning of the Court here, petitioner contends that its local activities of furnishing, supplying, maintaining, etc., its tractor-trailer units for use in commerce meets the test of immunity as applied in the loading and unloading of instrumentalities of commerce in the stevedoring cases.

However, in the present matter a material factual distinction is apparent, not present in the stevedoring cases, in that petitioner is also actively engaged in furnishing all over-the-road necessities to maintain its tractor-trailer units during transit in, to and through the several states, thereby relieving petitioner's lessee from all responsibility of mechanical failures, road hazards and supervision while transporting its goods in interstate commerce.

Petitioner contends that its activities in commerce, as such, are immunized by the commerce clause as measured by many decisions of this Court, including Fargo v. Michigan, 121 U. S. 230; Philadelphia & S. M. Steamship Co. v. Commonwealth of Pennsylvania, 122 U. S. 326; Galveston, Harrisburg & S. A. R. Co. v. State of Texas, 210 U. S. 217; Kansas City F. T. S. & M. Ry. v. Totkin, 240 U. S. 227, and later cases such as Freeman v. Hewitt, 329 U. S. 274, in which the decisions of the Court in the cases of International Harvester Co. v. Department of Treasury, 322 U. S. 340; and McGoldrick v. Berwin-White Coal Mining Co., 309 U. S. 33, were clearly distinguished from the Hewitt case, such distinction would also be applicable here. See Freeman v. Hewitt at page 279.

In the case of Central Greyhound Lines v. Measly, 334 U. S. 653, the Court in reversing and remanding, stated:

"The vice of such a tax is that it lays a direct burden upon every transaction in (interstate) commerce by withholding, for use of the estate, a part of every dollar received in such transaction. Crew Levick Co. v. Pennsylanvia, 245 U. S. 292; Adams Manufacturing Co. v. Storen, 304 U. S. 307; Freeman v. Hewitt, supra, Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 433."

The holding of the Court below when considered in the light of the reasoning in the Central Greyhound Lines case, other states than Tennessee in which petitioner's trucks operate could also collect a use tax based on the use value of the lease used and consumed in such state.

POINT NO. 3.

State Exemption of Interstate Transportation.

It is contended here, as in the Court below, that it was the intention of the Legislature of Tennessee to exempt interstate transportation from levy and collection of sales and use tax. Letter from Use Tax Division of State Department (R. 20).

The Act, Secs. 67-3002 (j), 67-3005, 67-3007 and 67-3018, particularly provide that a sale by lease for use and consumption is a taxable event only if the use and consumption is to be enjoyed in Tennessee.

The record here is conclusive that lessee's business since its incorporation in 1935 is and has been transporting farm and orchard products from most of the states of the United States, Mexico, Cuba, Ecuador, Guatemala and Honduras into Tennessee (R. 48).

The Retailers' Sales Tax Act was also designed to relieve the seller or lessor from payment of sales or use tax in the event the buyer, user or consumer is exempt.

Sec. 67-3020 (a) provides that the dealer shall collect the tax from the buyer or consumer. Appendix D.

Sec. 67-3020 (b) declares that the dealer shall be liable for and pay the tax, if he fails, neglects or refuses to collect from the user or consumer. Appendix D.

Sec. 67-3020 (d) refers to the tax as a penalty against the dealer if he fails to collect from the consumer, and also charges the dealer with a misdemeanor if he fails to collect from the consumer. Appendix D.

Petitioner contends that from the above sections of the Act it was the intention of the Legislature of Tennessee to relieve the seller or lessor from payment of the tax in the event its user or consumer was specifically exempt from payment of tax to the dealer.

In the case of Smoky Mountain Canteen Co. v. Kizer, 193 Tenn. 598, the Court stated as follows:

> "It seems to us, therefore, that the Legislature clearly intended to tax the gross sales except as to those things which are in the act specifically exempted. These specific exemptions are included in Section 6 of the Act Code, Sec. 1328.27. This list of exemptions does not include sales of small denominations or sales on which the vendor is unable to collect the tax from his customer."

The case of Madison Suburban Utility Dist. v. Carson, 191 Tenn. 300, is in point. The Court held in substance that:

> "Merchandise purchased by suburban utility district organized under Utility District Act from 'sellers within the state' and 'outside the state' was exempt from sales and use taxes, since the practical effect of collecting such taxes would be to diminish the revenue of the district, thus amounting to a 'direct

tax' levied by state on such revenue which is exempt from taxation by express terms of the Utility District Act. (Williams' Code, secs. 3695.26-3695.44, 3695.40; Pub. Acts, 1947, c. 3.)"

The Court stated with reference to the proposition of requiring a dealer to pay the tax and then move against an exempt consumer to collect the tax it had paid:

> "Should we affirm the Chancellor as to the right of the state to collect the use tax, this would in effect be holding that the sales tax, which we ordered refunded to Appellant, would be collected from Appellant's vendors, who in turn would be entitled to recover such taxes from the Appellant under those provisions of the Sales Tax Law requiring that vendors add the tax to the sales price of all articles sold."

Complainant insists that the question disposed of in the above case is parallel to the question here. However, in the present case, the exemption claimed is a part of the Act which declares the tax.

It was contended in the Courts below that the Statute exempts numerous users and consumers regardless of the articles of trade said consumers buy or use, such as eleemosynary institutions, churches and church supported activities, colleges, schools, orphanages, homes for the aged, hospitals, farmers, agricultural products, Federal, State, municipal governments and interstate commerce.

In all of the above exemptions the respondent, Commissioner, has recognized the non-liability of the dealers who sold to the exempt consumers, except in the instance here involving the exemption of interstate transportation. Sec. 67-3007, T. C. A.

Defense Raised by Respondent.

The respondent takes the position, as did the Court below, that the written contract entered into in 1940, with some later changes, did not restrict the use of petitioner's tractor-trailer units to use in interstate commerce, that petitioner's lessee could use said vehicles any place desired, including Tennessee.

If such is material, it is answered by the fact that the contract provided for the lease of a number of smaller trucks for local use in Tennessee[11] and respondent in his answer admitted that the tractor-trailer units were used regularly to transport goods from other states into Tennessee, and to transport goods from Tennessee to other states.

The Supreme Court of Tennessee, in another case, considered the terms of a use contract entered into prior to the effective date of the Sales Tax Act. Broadacre Dairies v. Evans, 193 Tenn. 441, stating that:

> "It seems to us that this lease is nothing more than a month to month proposition. The consideration being on what is done each month and not on something that was done prior to the effective date of the Act. It is immaterial under the Act when the property leased or rented entered the state or when the initial agreement was executed. It is what happened after the effective date of the Act."

Petitioner contends the respondent has singled out interstate commerce for a different and more burdensome treatment under the Act than is accorded local activities and that such is in violation of the commerce clause.

---

[11] During the period involved the 7 smaller trucks were leased for use locally with an occasional trip into border states.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

.....

D. L. LANSDEN,
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Nashville, Tennessee,
Attorney for Petitioner.

E. D. JACKSON,
A. D. TANNER,
507 American Trust Building,
Nashville, Tennessee,
Of Counsel.

Dated November ..., 1957.

I, the undersigned, do certify that on the .... day of November, 1957, I delivered to Mr. Milton Rice of counsel for respondent two copies of the within certiorari.

.....

D. L. Lansden.

APPENDIX A.

Filed Jul. 29
1957

Central Transportation Company
vs.
Z. D. Atkins, Commissioner, etc.

Davidson Equity.
Hon. Thomas W. Steele,
Chancellor.

For Appellant:

E. D. Jackson,
A. D. Tanner,
Nashville, Tennessee.

For Appellee:

George F. McCanless,
Attorney General,
Allison B. Humphreys,
Solicitor General, and
Milton P. Rice,
Assistant Attorney General,
all of Nashville, Tennessee.

Opinion.

This is another sales tax case. The question here is whether a Tennessee corporation engaged solely in the business of leasing its trucks within the State to another Tennessee corporation, which uses these trucks in the course of it business of transporting agricultural produce within and without Tennessee, is subject to the sales tax with respect to the consideration received by it on account of such lease. The prime question thus presented is whether this tax on this lease, as applied to the appellant, infringes the commerce clause of the Federal Constitution. U. S. C. A., Constitution, Article 1, Sec. 8, Cl. 3.

Appellant, a Tennessee corporation, was formerly engaged in the transportation business, but for the past several years (at least since the Sales Tax Act was enacted in this State) its sole activity has been in the leasing of trucks belonging to it to the Central Produce Company, another Tennessee corporation, engaged in the buying and

selling at wholesale of agricultural produce. Both the appellant and its lessee's principal place of business is located in Nashville, Tennessee. The appellant has a written lease with its lessee which was originally entered into in 1940 and is about the same except for certain amendments that have been made since that time. This lease agreement provides in substance that the equipment is leased to the lessee for a stipulated amount of rental, which includes an agreed flat rental per month plus a stipulated amount per mile. The appellant, lessor, is required to furnish gasoline and oil and keep the trucks in a reasonable state of repair, and to replace worn out equipment upon demand. The lessee has agreed to keep strict account of every mile operated by the vehicles, use only experienced drivers, inspect the trucks before each trip, carry appellant's name upon each vehicle and pay the rental on the first of each month. The lessee is free to use the vehicles in any manner which it pleases and at any place and any time for any hauling which it may desire.

There are two classes of trucks covered by this lease, large trucks which are under this record used about 90% or better for hauling produce great distances and from without the State, while the smaller trucks are used for local delivery. There is nothing in the lease that precludes the use of any of these trucks for any purpose or at any place that the lessee may choose, nor is there anything said in the lease about the fact that the larger trucks are to be used largely in out of State traffic.

For all practical intents and purposes the expenses incurred upon the trucks traveling outside of Tennessee, except drivers' wages, were paid by the appellant, lessor. These expenses consisted, in addition to gas, oil and repairs, of ice to cool produce while in transit, food and lodging for the drivers, toll roads and bridges, weight scales, permits to operate and loading cost. The amounts paid for ice were reimbursed by the lessee.

The books of the appellant were checked in 1955 and the Commissioner on this check assessed the appellant with sales tax, penalty and interest based on the tax. The case was tried on a bill which sought to recover the tax and penalties which were paid under protest, the Commissioner's answer as amended and proof which consisted of depositions of the President of the appellant corporation and its chief Bookkeeper. The Chancellor held that the appellant was liable for the tax and dismissed the bill. It is from this that the appellant has seasonably perfected its appeal, filed excellent briefs and the matter has been ably argued and after reading the record, the briefs, the authorities there cited and others, we are now ready for a determination of the matter.

> "A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize." McLeod, Comm., etc., v. J. E. Dilworth Co., 322 U. S. 327, 64 S. Ct. 1023, 1026, 88 L. Ed. 1304.

This tax of course is a privilege tax and is upon the privilege of "lease or rental" of tangible personal property in this State. Article 67-3003, T. C. A.; Broadacre Dairies v. Evans, 193 Tenn. 441, 246 S. W. (2d) 78; Saverio v. Carson, 186 Tenn. 166, 208 S. W. (2d) 1018. The Act defines the term "sale" for the purpose of this Act to include any transfer by "lease or rental" of tangible personal property and such terms as "lease or rental" mean the leasing or renting of tangible personal property. Section 67-3002 (b), T. C. S., and 67-3002 (f), T. C. A.

The tax is collectible from persons engaged as "dealers," Section 67-3016, T. C. A., and a "dealer" includes one who leases or rents tangible personal property with or without transferring the title to the other person. Section 67-3017, T. C. A. In other words the incidence of the sales tax in this State is upon the seller (Hooten v. Carson, 186 Tenn. 282) or as imposed in this case was on the lessor (appel-

lant). This tax is not upon the buyer, or lessee even though the lease shifts the economic burden to the buyer with respect to the transaction.

Of course, the State is powerless to levy a tax upon interstate commerce and so far as this tax act is concerned in this particular instance we can find no effort of the State to be unfair in levying a tax which is a burden on interstate commerce. Just because the lessee under this lease might want to use the leased goods in interstate commerce is a matter entirely up to the lessee's choice and control. It must be remembered that this lease was executed in Tennessee between two Tennessee corporations. The tax is on the lessor and on the making of the lease and nothing is contemplated by the terms of this lease that the tax would be a burden on commerce between the States. The lessor, under the terms of this lease, reserved no power to determine when and where and how the lessor used these trucks and did business. All the appellant did was to furnish it the trucks to do business with.

As just said this tax is on the privilege of engaging in the business of leasing tangible personal property in this State. The measure of this tax is by law the gross proceeds derived from such leasing. If a portion of this rental by reason of mileage traveled outside of Tennessee this is a situation about which the parties arranged in their lease. The State had nothing to do with the establishment of the measure by which these parties determined the amount of the rental to be paid in their contract.

Under this tax as applied here the lessor, appellant, is taxed just like anyone else would be in Tennessee who makes a lease. The tax is no higher and made in no different manner with respect to this lease to the Tennessee Produce Company than it would be in respect to a lease of its property to a lessee confining its operations wholly within the City of Nashville. In other words the

tax is on the lease and the base of this tax is on the gross proceeds derived from the lease transaction and nothing else.

The very able argument is made by the appellant that:

> "Had complainant's vehicles been **transferred by sale** to lessee instead of by lease, **the sale would have been a taxable event since the sale would have spent its force** as all other sales to consumers in Tennessee, prior to the use of said trucks in hauling exempt agricultural products."

In other words this argument is that if the appellant had sold outright its trucks to the Tennessee Products Company, its lessee, it admittedly would pay tax on this sale but since the tax is based upon the amount of money that this lessor is to get from this lease and that 90% plus of the use of these large trucks is in other States rather than in Tennessee that then that the making of the lease does not cover the entire transaction but the force of the lease is the use in these other States. As we said above, the incidence though of the Tennessee States Sales Tax is on the leasing of the property in Tennessee. It is not on taking them into some other State or here or there but it is on that transaction of making the lease and as far as the taxable act is concerned it has been spent when the lease was made. In other words the able argument is made, "that a lease or rental of tangible property does not create a taxable transaction in Tennessee unless the leased property is used and consumed in Tennessee, . . ." As we see it and under the decisions of the Supreme Court of the United States this though is not the test. The test is where the lease was made upon which the tax is based. The tax is based upon the making of the lease in Tennessee. It is not upon what was going to be done under the lease because that is a thing that the parties could work out among themselves.

In determining the question here, naturally since it involves the Constitution of the United States, we must turn to the Federal cases.

The Supreme Court of the United States sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfillment of the contract. Wiloil Corp. v. Pennsylvania, 294 U. S. 169, 55 S. Ct. 358, 79 L. Ed. 838; Graybar Electric Co. v. Curry, 308 U. S. 513, 60 S. Ct. 139, 84 L. Ed. .... The author of American Jurisprudence sums up the question here involved in very apt words thus:

> ". . . there are a number of other decisions, among which are several by the Supreme Court of the United States, which hold that a general sales tax does not unconstitutionally burden interstate commerce as applied to sales (1) on orders solicited in the taxing jurisdiction (the contracts themselves sometimes being entered into there also), (2) by a seller maintaining a place of business in the taxing jurisdiction, (3) even though the orders, by reason of convenience or impracticability, are to be filled through subsequent interstate transportation of the merchandise from a source beyond the borders of the taxing jurisdiction, (4) provided that delivery is made to the purchaser in the taxing jurisdiction either (a) directly from such extrastate source, or (b) by relay through the offices of the seller in the taxing jurisdiction, and (5) provided further than no congressional enactment or policy is thereby offended." 47 Am. Jur., Sales & Use Taxes, Sec. 10, p. 210.

It is also said that the emphasis in the opinions of the Supreme Court of the United States which we read and are cited in the text are based on the fact that the delivery to the purchaser was made in the taxing district. Among other cases cited in support of this text is that of Mc-

Goldrick v. Berwin-White Coal Mining Co., 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, 128 A. L. R. 876.

In that case the late Mr. Justice Stone, afterwards Chief Justice, made some very apt comments which are applicable here. Among other things he said:

"It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations." 60 S. Ct. 391, and at page 392:

"Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation." And at page 393:

"Equality is its theme (citing authority). It does not aim at or discriminate against interstate commerce."

The appellant puts much faith and reliance in the case of Freeman v. Hewitt, 329 U. S. 249, 91 L. Ed. 265, 67 S. Ct. 274. In this case there is a gross income tax imposed upon the proceeds of the sale of securities sent out of the State to be sold. The case is interesting but we think this sentence at the conclusion of the majority of opinion shows the distinction between this case and the case now before us. The Court there said:

"Of course this is an interstate sale." 67 S. Ct. 280.

Then of course the Court reaches the conclusion that it being interstate the law imposing the tax on the sale by Indiana was void. We think the case is clearly distinguishable from the case now before us. The tax here was on the making of the lease, not on what was done after the lease was made.

Great reliance was likewise put by the appellant on Joseph, Comptroller, etc. v. Carter & Weekes Stevedoring

Co., 330 U. S. 422, 67 S. Ct. 815, 91 L. Ed. 993. There the Supreme Court of the United States held that a local tax on gross receipts or upon the privilege of conducting business in stevedoring for interstate or foreign commerce measured by these gross receipts was invalid as unduly burdening or interfering with commerce. The gravamen of that opinion was that the movement of cargo off and on a ship is substantially a continuation of the movement or transportation in interstate commerce and any tax, the tax as it was based on the unloading or loading of this, was likewise an interference with interstate commerce. Obviously there was an entirely different situation there from the tax here as has been discussed at length herein. The Court in that opinion, 67 S. Ct. 819, made this pertinent remark:

> "The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit."

The Court cites many of its cases wherein the tax was held invalid and says:

> ". . . that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions."

Clearly under the facts of the instant case it is distinguishable because the tax here is on the lease made, this is the taxable event and not on the use that these trucks were put to in interstate commerce even though this mileage was a thing that the lessor and lessee decided between themselves to make a basis for a portion of the price paid for this lease.

The Commissioner relies upon the case of International Harvester Co. v. Indiana Department of Treasury, 322 U. S. 340, 88 L. Ed. 1313, 64 S. Ct. 1019, as determinative of the issue here in its favor. In this case among other things the Supreme Court of the United States had before it the taxing statute of Indiana among which was what was known as:

> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state."

On this class of sales the Supreme Court of the United States held that the tax was valid. The Court saying (64 S. Ct. 1021):

> "Moreover, both the agreement to sell and the delivery took place in Indiana. These events would be adequate to sustain a sales tax by Indiana."

Then citing the McGoldrick case, supra, and quoting from it and then saying:

> "Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation of intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce. The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other."

And again at page 1023 of 64 S. Ct. the Court said:

> "The consummation of the transaction was an event within the borders of Indiana which gave it authority

to levy the tax on the gross receipts from the sales. And that event was distinct from the interstate movement of the goods and took place after the interstate journey ended."

We must agree with this reason and conclusion as did the Chancellor and for these reasons hold that this was not a tax interfering with interstate commerce but was a tax between local concerns on a local transaction regardless of what they did afterwards.

Then it is argued herein that the fact that these trucks hauled agricultural products which in themselves were under the statute free from tax that they should not be taxed. What these trucks hauled is immaterial. The Commissioner does not undertake or did not undertake in this case to levy this tax with respect to the merchandise hauled by the lessee. As so frequently said herein this was a tax on the lease made by the lessor and the lessee.

Considerable proof was taken as to certain expenses which were paid by the lessee in the course of this transportation which had been assumed by this appellant. Under the lease agreement the appellant is obligated only to furnish gasoline and oil to its trucks and to keep them in a proper state of repair. The other expenses, such as tolls, food and lodging for drivers, etc., have apparently been assumed by the lessor or appellant outside the terms of this lease contract. Why this was done we do not know and cannot find in the record but, be that as it may, it does not seem to us that the over-all arrangements by having done this are in any wise changed—after all this is a lease of trucks (tangible personal property) at an agreed rental price which as we understand it under the law constitutes the base of the sales tax. Under the statute it is plain that this tax is to be paid on the final rental or selling price, even though this price may include service charges. Saverio v. Carson, supra.

We think what has been said above really answers all pertinent or determinative questions herein except that of relieving the taxpayer of the penalty and interest. In some instances, notably that of Esso Standard Oil Co. v. Evans, 194 Tenn. 377, and cases there cited, this was done. As we understand the authorities on the question this is a matter for the trier of facts, the Chancellor, to exercise his discretion on. In the Esso case this Court said:

> "From the foregoing authorities, we conclude that the matter of the remission of interest and penalty was within the sound discretion of the Chancellor, and on the facts of this case, we find no abuse of that discretion."

We have read this record and as heretofore said, listened to the able arguments and read the briefs and cannot really find from these wherein the Chancellor abused his discretion in failing to strike the interest and penalty when he determined this matter.

For the reasons here expressed we are constrained to affirm the opinion of the Chancellor.

.....

Hamilton S. Burnett, J.

APPENDIX B.

Central Transportation Company
v.
Z. D. Atkins, Commissioner, etc.
} Davidson Equity. Affirmed.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the original bill be dismissed; and that the Central Transportation Company, principal; E. D. Jackson, surety; pay all the cost of this cause, for which let execution issue. 7/29/57 R.

APPENDIX C.

Filed Oct. 4, 1957

Central Transportation Company
vs.
Z. D. Atkins, Commissioner, etc. } Davidson Equity.

Opinion on Petition to Rehear.

The complainant, Transportation Company, has filed herein a forceful reargument of the propositions heretofore so ably argued, as a petition to rehear. There are numerous cases cited herein which were not referred to in the original brief, but none of these are in point or governing as to the proposition herein decided. We have very carefully read and reread this petition along with the authorities therein cited and must frankly say that they have not changed our mind.

Among the cases cited in this petition is the case of Bruce Motor Freight v. Lautherbach (Iowa), 77 N. W. (2d) 613, which was decided by the Supreme Court of Iowa on June 19, 1956. This case is very strongly relied upon by the petitioner in support of the propositions here raised. We think though that the following sentence taken from this Iowa opinion shows clearly how this case differs from the case now before us, and is, therefore, not in point. That Court says:

> "The motor vehicles and trailers were all purchased, or leased by or to appellees for use in interstate transportation, and for no other purpose. There was no taxable moment as to any of the personal property involved in these cases prior to its being placed in interstate transportation." 77 N. E. (2d) 620.

All of the cases cited in this petition to rehear are sound, as we see them, based on the facts there considered, but in our view none of them factually meet the situation in the instant case. Frankly we feel that or original opinion expresses the correct viewpoint and that it would certainly be mere repetition if we tried to again state what we have there stated. We have no argument with the propositions decided in any one of these cases based upon the taxable event as shown by the facts of each of those particular cases.

The questions raised originally in this lawsuit and now again re-argued relate to whether a lease of vehicles, which are subsequently employed in interstate commerce, is sufficiently disjointed from that interstate commerce to constitute an event wherein the State could levy a tax thereon. We particularly answered this question on pages 5 and 6 of our original opinion and therein attempted to show that the tax here, as we saw it, was based on the transfer of these trucks under this lease (that was the instance of tax) and not on the mere execution of the lease.

This tax as levied in this act is not a tax attempted to be levied upon the receipts from interstate commerce. So far as we know all authorities are to the effect that a State cannot levy a tax upon receipts derived from interstate commerce. As we pointed out in our original opinion the lessor (complainant in this action) in that lease had nothing whatever to do with the use of the property in interstate commerce. Under this lease the lessee of these trucks could have used them entirely within the State of Tennessee. If he had done so there would absolutely be no claim that the taxable event of leasing these trucks had anything to do with its theory of non-taxability.

The tax in question here is not upon gross receipts of any character, but upon the privilege of engaging in a certain type of business—that is, the leasing of tangible

personal property. We cited authorities in our original opinion to support such taxation. The receipts from this business herein compromise merely the measure of the tax. Merely because some of these receipts come from interstate business is because the lessee so willed it and not because the State has attempted to in anywise assess a tax on interstate receipts.

As we said in our original opinion this to us has been a very interesting case, it has been exceptionally well presented and well briefed. We are sorry that we cannot agree with counsel but it just happens that we cannot and we feel that what we have said in our original opinion answers the matter completely and that that is the logical, reasonable method and way in which the lawsuit should be decided. Being of this mind it results that the petition to rehear must be overruled.

.....

Hamilton S. Burnett, J.

APPENDIX D

Retailers' Sales Tax Act.

67-3001. Short title—Additional tax.—This chapter shall be known as the "Retailers' Sales Tax Act" and the tax imposed by this chapter shall be in addition to all other privilege taxes.

67-3002. Definition of terms.—(b) "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property.

A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

67-3002 (j). "Retailer" means and includes every person engaged in the business of making sales at retail, or for distribution, or use, or consumption, or storage to be used or consumed in this state.

67-3005. Use tax on imports.—On all tangible personal property imported, or caused to be imported from other states or foreign country, and used by him, the "dealer" as defined in Sec. 67-3017, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately

levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

67-3007. Interstate commerce exempt.—It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export; nor is it the intention of this chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

67-3016. Collection from dealers.—The aforesaid tax at the rate of two per cent (2%) of the retail sales price, as of the moment of sale, or two per cent (2%) of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in Sec. 67-3002, engaged as dealers, as defined in Sec. 67-3017, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property.

67-3017. "Dealer" defined.—The term "dealer" is further defined to mean every person, as used in this chapter, who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state. . . .

67-3018. Collection of tax from purchaser.—Every "dealer" making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, shall at the time of making sales, collect the tax imposed by this chapter from the purchaser.

67-3019. Offer by dealer to absorb tax prohibited.—A person engaged in any business taxable under this chapter shall not advertise or hold out to the public, in any man-

ner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than two hundred fifty dollars ($250), or imprisonment in the county jail for not more than three (3) months, or both, in the discretion of the Court. For a second or subsequent offense the penalty shall be double.

67-3020. Collection and payment by dealers. (a) The privilege tax herein levied, measured by retail sales shall be collected by the dealer from the purchaser or consumer.

(b) Dealers shall, as far as practicable, add the amounts of the tax imposed under this chapter to the sales price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him, or his agents, or employees, or tangible personal property which is subject to the tax imposed by this chapter, shall be liable for and pay the tax himself.

(d) Any dealer who shall fail, neglect, or refuse to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one hundred dollars ($100) or imprisonment in the county jail for not more than three (3) months, or both, in the discretion of the court.

67-3045. Rules and regulations. The commissioner shall have the power to make and publish reasonable rules and regulations not inconsistent with this chapter or the other laws, or the Constitution of this state or the United States, for the enforcement of the provisions of this chapter and the collection of revenues hereunder.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 630

CENTRAL TRANSPORTATION COMPANY,

vs.

Z. D. ATKINS, Commissioner of Finance and Taxation of the State of Tennessee.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	5
I. The decision below is clearly correct	6
II. There is no important question of federal law	9
Conclusion	12

Cases Cited.

Aero Mayflower Transit Co. v. Board of R. R. Com'rs, 332 U. S. 495, 499f, 92 L. Ed. 99, 105 5

Broadacre Dairies v. Evans, 193 Tenn. 441, 246 S. W. (2nd) 78 6

Carbide & Carbon Chem. Corp. v. Carson, 192 Tenn. 150, 239 S. W. (2nd) 27 6

Eastern Air Transport, Inc., v. South Carolina Tax Comm., 285 U. S. 147, 76 L. ed. 673 ..... 10, 11

Helson & Randolph v. Kentucky, 279 U. S. 245, 73 L. Ed. 683 11

Hooten v. Carson, 186 Tenn. 282, 209 S. W. (2nd) 273 5

International Harvester Co. v. Indiana Dept. of Treasury, 322 U. S. 340, 88 L. Ed. 1313 ..... 6, 8

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. Ed. 565 6

Smoky Mountain Canteen Co. v. Kizer, 193 Tenn. 598, 247 S. W. (2nd) 69 6

Statute Cited.

Sections 67-3001-67-3048, T. C. A. 2

Sections 67-3018-67-3020, T. C. A. 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

CENTRAL TRANSPORTATION COMPANY,

vs.

Z. D. ATKINS, Commissioner of Finance and Taxation of the State of Tennessee.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Chancery Court of Davidson County (R. 142-152) is not reported. The original opinion of the Supreme Court of Tennessee (R. 161-172), and the opinion of the same court on petition to rehear (R. 196-198) are unofficially reported in ... S. W. (2nd) ..., and will be reported officially in ... Tenn. ....

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether Tennessee can impose upon petitioner, a Tennessee corporation engaged in the business of leasing trucks within Tennessee to another Tennessee corporation, which uses said trucks in the course of its business of transporting agricultural produce within and without Tennessee, its sales tax based upon the privilege of selling, leasing or renting tangible personal property in Tennessee, and measured by the gross proceeds derived from such business.

STATUTE INVOLVED.

The only statute involved in this case is the sales and use tax law of Tennessee, Sections 67-3001-67-3048, T. C. A.

STATEMENT.

This litigation concerns the application of the Tennessee sales tax statute to petitioner for the period from November 21, 1949, to December 1, 1955 (R. 143). Petitioner is a Tennessee corporation with offices in Nashville, whose sole business during the period in question consisted of the leasing of its trucks to the Central Produce Company, likewise a Tennessee corporation with offices in Nashville (R. 42-43, 116, 124). The latter concern is engaged in the business of buying and reselling at wholesale farm and orchard produce (R. 43, 109).

Petitioner's lease of the vehicles in question to Central Produce Company was pursuant to a written lease contract entered into on April 8, 1940 (R. 17-19). Said contract

provided for the lease by petitioner to Central Produce Company of a number of large trucks and a number of small trucks in consideration of payment monthly by the lessee of a flat sum per month for each vehicle plus a stated amount per mile each vehicle was operated by the lessee (R. 18). The lessor agreed by the lease to furnish gasoline and oil for the trucks, to keep them in a reasonable state of repair, and to replace worn out equipment when necessary (R. 18-19). The lessee agreed to use only experienced drivers and inspect each truck before allowing it to be used on any trip (R. 19). The lessee further agreed that the name of petitioner should appear on each truck, but also was accorded the right to place its own name thereon (R. 18).

In addition to the operating expenses required by the contract to be borne by the lessor, petitioner furnished food and lodging for the truck drivers, paid all tolls and weighing fees, and provided permits to operate (R. 117, 163). Petitioner also provided ice to cool the produce hauled while in transit, but was reimbursed therefor by the lessee (R. 163).

During the period in controversy, petitioner received in rentals with respect to the large trucks $483,659.69, and with respect to the small trucks $51,106.07, making a total of $534,765.76 (R. 143). After allowing a credit against the latter figure in the amount of $115,351.01, representing purchases of repair parts within Tennessee with respect to which petitioner had already paid the Tennessee sales tax, respondent assessed and collected under protest from petitioner the sum of $12,967.66 in sales taxes, penalties and interest based upon its rentals from the lease of the trucks (R. 143-144, 39).

During the period in controversy, petitioner's large trucks, which were employed by the lessee in lessee's

long-haul operations, traveled 1,968,485 miles outside Tennessee and 41,212 miles within Tennessee, while the small trucks, used for local delivery, operated entirely within Tennessee (R. 139, 118).

The Supreme Court of Tennessee held, affirming the decision of the Chancery Court, Part I, of Davidson County in all respects, that the Tennessee sales tax was validly imposed upon petitioner for the exercise of the privilege of leasing or renting tangible personal property in Tennessee, and that petitioner was not entitled to recover the amount paid under protest (R. 161, 172, 196-198).

ARGUMENT.

The question presented in this case is narrow, and upon the basis of previous clear-cut decisions of this Court, it does not merit review by certiorari.

Stated basically, it is whether the concededly exclusive power of Congress to regulate interstate commerce precludes a state from imposing upon one of its own citizens a tax for the privilege of leasing property to another Tennessee citizen, who is free to employ such property at all times in whatever place and manner it may choose.

Petitioner's case in the state courts and in this court is bottomed on the premise that, in leasing vehicles to a lessee which employed some of them in interstate commerce, and in performing contractual and extra-contractual functions with respect to their maintenance and operation, petitioner itself became entitled to the constitutional immunities of an interstate commerce instrumentality with respect to the amounts derived by it from such lease. In support of its argument, it assumes that the lessee's operations are such that it would be entitled to complete immunity from sales or use taxation by Tennessee, and reasons that, since the lessor is required by Sections 67-3018-67-3020, T. C. A., to pass sales taxes on to its customer insofar as practicable, the state law necessarily by implication confers immunity upon the lessor as well.

Under the decisions of this court, it will look in testing state statutes to the construction accorded them by the highest court of the state, and accept that construction as binding unless it is patently given for an unconstitutional purpose. **Aero Mayflower Transit Co. v. Board of R. R. Com'rs,** 332 U. S. 495, 499f, 92 L. Ed. 99, 105. The highest court of Tennessee soon after the enactment of the sales tax statute held that the tax was a vendor tax (**Hooten v. Carson,** 186 Tenn. 282, 209 S. W. [2nd] 273), and it repeatedly recognized and adhered to this principle in ensuing

cases where it was pertinent. **Carbide & Carbon Chem. Corp. v. Carson,** 192 Tenn. 150, 239 S. W. (2nd) 27; **Broadacre Dairies v. Evans,** 193 Tenn. 441, 246 S. W. (2nd) 78; **Smoky Mountain Canteen Co. v. Kizer,** 193 Tenn. 598, 247 S. W. (2nd) 69. The opinion of the Tennessee Supreme Court in the instant case but reiterates it (R. 164).

The construction accorded Tennessee's sales tax statute by its highest court should be accepted as determinative of the question of the incidence of the tax, whereupon it will follow that no substantial federal question is presented by the petition.

I.

The Decision Below Is Clearly Correct.

Tennessee of course concedes that no state can impose upon interstate commerce a tax levy which has the effect of unduly burdening, restraining or regulating that commerce. Clearly, however, under the previous decisions of this court, a state tax upon the exercise of a purely local privilege has no such effect and does not offend the commerce clause of the Constitution.

Respondent relies here, as it did in the state courts, upon the opinions of this court in the cases of **McGoldrick v. Berwind-White Coal Mining Co.**, 309 U. S. 33, 84 L. Ed. 565, and **International Harvester Co. v. Indiana Dept. of Treasury**, 322 U. S. 340, 88 L. Ed. 1313. In the latter case, this court was called upon to consider the application of the Indiana gross income tax to what was known as:

> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state."

In sustaining the tax as to such sales, it was said (322 U. S. at p. 345f, 88 L. Ed. at p. 1317):

> "The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes

to Indiana, takes delivery there and transports the goods to another state. The Wood Preserving Corp. Case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, **both the agreement to sell and the delivery took place in Indiana. These events would be adequate to sustain a sales tax by Indiana.** In McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.' Id. 309 U. S., p. 43, 84 L. ed. 568, 60 S. Ct. 388, 128 A. L. R. 876. And it was 'conditioned upon events occurring' within New York, i. e., the 'transfer of title or possession of the purchased property.' Id., pp. 43, 44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each **a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce.** In neither does the tax **aim at or discriminate against interstate commerce.** The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other. Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (Nelson v. Sears, R. & Co., 312 U. S. 359, 363, 85 L. ed. 888, 891, 61 S. Ct. 586, 132 A. L. R. 475), we must acknowledge that **the sales tax sustained in the Berwind-White Case 'was, in form, imposed upon the gross receipts from an inter-**

state sale.' Lockhart, Gross Receipts Taxes on Inte state Transportation and Communication, 57 Harvar L. Rev. 40, 87. But that case did no more than t hold that those in interstate trade could not complai if interstate commerce carried its share of the burden of local government which helped sustain it. An there was no showing that more than that was bein exacted." (Emphasis supplied.)

What is the situation in the instant case? A Tennesse lessor (seller) enters into a contract of lease, in Tennesse (R. 19), with a Tennessee lessee (buyer), to furnis vehicles which may be used whenever and wherever th lessee (buyer) chooses, with possession of the vehicle being turned over in Tennessee (R. 131) and the co sideration inferably being paid in Tennessee. Tennesse imposes its sales tax with respect to leases or rentals upo the lessor (seller) for the exercise of a defined privileg namely the leasing (selling) of tangible personal propert within her borders. Not only the leasing, but every e sential aspect of the transaction, was local in characte Extra-state or interstate use of the leased property by th lessee comprised no part of the contract. Time, place an manner of use was neither prescribed nor circumscribe in the contract, and the rights and obligations of the re spective parties stood in no wise to be enlarged or dimi ished according to the situs or mode of the lessee's use.

The taxable event in the instant case, the act of leasing was separate and distinct from commerce between th states, or with foreign countries, no less than in the **Inte national Harvester** case. In fact, the "Class D sales" i that case had considerably more of an interstate com plexion than did petitioner's lease in the case at bar, fo there the buyer was a non-resident of Indiana who trans ported the goods outside the state immediately on de livery, whereas here both parties were and continued to b Tennessee residents. If the Indiana levy did not burde

commerce, it is difficult to perceive how Tennessee's taxation of petitioner can do so.

There is positively no discrimination against interstate commerce in the case at bar. Petitioner is subjected to the same tax, on the same basis, and at the same rate and measure as anyone else leasing tangible personalty to others for a consideration. The fact that petitioner's lessee operates interstate or outside Tennessee does not serve to broaden petitioner's statutory liability for the tax one iota, or deprive it of any immunity or advantage which it would otherwise enjoy. Interstate commerce is placed at no competitive disadvantage as against intrastate business of the same character.

The tax is not one susceptible of duplication by other states. Only Tennessee possesses the requisite jurisdiction to tax a transaction, in this case the act of leasing, consummated wholly within her borders. Indeed, if Tennessee is precluded from taxing petitioner for the privilege of leasing trucks within Tennessee to a lessee who is free to use them as it pleases, then petitioner will go scot-free, to the manifest unjust competitive disadvantage of others who lease trucks within Tennessee, and within other states having sales taxes, to lessees who are unfettered as to place and manner of use.

It follows therefore, that the Tennessee sales tax was validly imposed upon petitioner, and that the action of the Tennessee courts in sustaining it was clearly correct.

II.

There Is No Important Question of Federal Law.

Petitioner seeks to invoke the commerce clause by its insistence that it, in leasing vehicles to one engaged in buying, selling and transporting merchandise across state lines for the lessee's own account, and by maintaining

such vehicles, becomes itself an interstate instrumentality beyond the pale of state taxation. This contention finds refutation in a case decided by this Court in 1932, **Eastern Air Transport, Inc., v. South Carolina Tax Comm.**, 285 U. S. 147, 76 L. ed. 673, wherein immunity under the commerce clause was asserted by an interstate airline concern with respect to gasoline purchased for its airplanes from South Carolina dealers. Said this Court, after noting that the tax was an excise tax upon the dealer for the privilege of carrying on the business of selling gasoline within the state:

> "'• • • Undoubtedly, purchases of goods within a State may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected'" (285 U. S. 152f, 76 L. ed. 675).

The cases relied upon by petitioner hold correctly that a state may not lay a tax upon the gross receipts derived from interstate commerce; or any local incident thereof, so closely related to the commerce as to be a part thereof. What is involved in the case at bar however is not a gross

receipts tax, but a sales tax; nor is it laid upon interstate commerce itself, but upon the purely local activity of leasing property to one who may employ it in interstate commerce or not as it may choose. Such activity is not so identified with the commerce carried on by the lessee as to make it immune from non-discriminatory taxation, and this Court so held in so many words in **Eastern Air Transport v. South Carolina Tax Comm.**, supra.

Petitioner suggests that other states might exact with respect to its vehicles a use tax based upon the use value consumed therein. The record is, however, devoid of anything which would indicate that any such tax has been so exacted, paid or sought to be exacted. Respondent does not understand that such a tax would be constitutionally permissible, inasmuch as a tax upon use consisting entirely of use in the course of interstate commerce would probably amount to a burden on that commerce. **Helson & Randolph v. Kentucky**, 279 U. S. 245, 73 L. Ed. 683.

To invoke the immunity from state taxation afforded by the commerce clause of the Constitution, one must show that he is engaged in interstate commerce, or some integral part thereof, with respect to the subject sought to be taxed. This petitioner has not done and cannot do, because petitioner's business is localized in Tennessee and has no interstate aspect other than the fact that its lessee independently engages in commerce as it chooses, and freely employs the vehicles leased from petitioner in that commerce. The lease of vehicles by petitioner to a business operating across state lines is no different in principle from a sale to petitioner of supplies and parts for the vehicles, the Tennessee sales tax with respect to which petitioner always paid without question (R. 105-106). Yet if petitioner is, as it contends, engaging in interstate commerce by leasing trucks to one who uses them in such commerce, its purchases for those trucks should also enjoy immunity. Such would not be the law, however, for this Court has never

extended the protection of the commerce clause to sellers with respect to purely local sales, though sales taxation of such sales by the states indisputably adds to the ultimate cost to the purchaser doing a business which may be entirely interstate.

It is therefore clear that Tennessee's sales tax being a vendor tax, and having been consistently so held by its highest court, and having been applied to petitioner on account of entirely local activities which bring petitioner squarely within its terms, and not in contravention of the commerce clause of the Constitution under previous decisions of this Court, no federal question warranting review by certiorari is presented by the petition herein.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be dismissed.

Respectfully submitted,

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I hereby certify that I have delivered on the ..... day of ....., 1957, to Mr. Eugene D. Jackson, Sr., American Trust Building, Nashville, Tennessee, counsel for the petitioner herein, two copies of this response.

Milton P. Rice,
Assistant Attorney General